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No. 98-1696

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ROY LEE JOHNSON

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF CONTENTS

		Page
A.	Congress unambiguously provided that a defendant's term of supervised release commences only when he is actually released from prison	1
B.	Terms of supervised release should not be shortened in order to preserve appeals that would otherwise be moot	5
C.	Congress has provided an avenue of meaningful relief for defendants who have been incarcerated on a conviction that is subsequently vacated	10

TABLE OF AUTHORITIES

Cases:

Bailey v. *United States*, 516 U.S. 137 (1995)	3
Mabry v. *Johnson*, 467 U.S. 504 (1984)	7
Sibron v. *New York*, 392 U.S. 40 (1968)	5, 7
United States v. *Cottman*, 142 F.3d 160 (3d Cir. 1998)	6, 7, 8
United States v. *Davis*, 112 F.3d 118 (3d Cir.), cert. denied, 522 U.S. 888 (1997)	3
United States v. *Dozier*, 119 F.3d 239 (3d Cir. 1997)	10
United States v. *Eske*, 925 F.2d 205 (7th Cir. 1991)	8
United States v. *Fadayani*, 28 F.3d 1236 (D.C. Cir. 1994)	6, 7, 8
United States v. *Gordils*, 117 F.3d 99 (2d Cir.), cert. denied, 522 U.S. 975 (1977)	3
United States v. *Joseph*, 109 F.3d 34 (1st Cir. 1997)	9
United States v. *Morris*, 116 F.3d 501 (D.C. Cir.), cert. denied, 522 U.S. 975 (1997)	3
United States v. *Smith*, 103 F.3d 531 (7th Cir. 1996), cert. denied, 520 U.S. 1248 (1997)	3

Cases—Continued: Page

United States ex rel. Shuster v. *Vincent*, 524 F.2d 153 (2d Cir. 1975) 4
White v. *Pearlman*, 42 F.2d 788 (10th Cir. 1930) 4

Statutes and regulations:

18 U.S.C. 924(c) 3
18 U.S.C. 3143(b) 6
18 U.S.C. 3553(a)(2)(A) 9
18 U.S.C. 3553(a)(2)(B)-(D) 9
18 U.S.C. 3583(b) 11
18 U.S.C. 3583(b)(2) 11
18 U.S.C. 3583(b)(3) 11
18 U.S.C. 3583(c) 9
18 U.S.C. 3583(e)(1) 10, 11, 12
18 U.S.C. 3583(e)(2) 11
18 U.S.C. 3624 ..... 5, 10
18 U.S.C. 3624(a) 2, 3, 4
18 U.S.C. 3624(e) 2, 4, 8
18 U.S.C. 3742 5
21 U.S.C. 841(b)(1)(D) 11
Sentencing Guidelines:
§ 2D1.1(b)(1) 3
§ 5D1.1(a) 8
§ 5D1.1(b) 8

Miscellaneous:

Administrative Office of the United States Court, *Judicial Business of the United States Courts* (1998) 11
S. Rep. No. 225, 98th Cong., 1st Sess. (1983) 4, 9, 11, 12

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REPLY BRIEF FOR THE UNITED STATES

A. Congress Unambiguously Provided That A Defendant's Term Of Supervised Release Commences Only When He Is Actually Released From Prison

Our submission in this case is that a term of supervised release commences only when a defendant is actually released from prison, and not on an earlier date when he should, in retrospect, have been released under a subsequent judicial decision that clarified the law. Respondent argues (Br. 11) that various provisions of federal sentencing law "are in conflict" and thus create ambiguity on this issue. Respondent is incorrect.

In the statute governing "Supervision after release," Congress provided that "[a] term of supervised release commences on the day the person is released from

imprisonment and runs concurrently with any Federal, State, or local term of probation or supervised release or parole for another offense to which the person is subject or becomes subject during the term of supervised release." 18 U.S.C. 3624(e). Congress further provided that "[a] term of supervised release does not run during any period in which the person is imprisoned [for 30 or more consecutive days] in connection with a conviction for a Federal, State, or local crime." *Ibid.* Section 3624(e) thus makes clear that a term of supervised release cannot commence before the day on which a person is actually released from prison—or, in other words, that a term of supervised release cannot run concurrently with a term of imprisonment (except a term, unlike respondent's here, of less than 30 days).

Respondent contends (Br. 9-14) that Section 3624(e) is ambiguous in its application to persons who served time in prison on a conviction that ultimately was ruled invalid under a subsequent judicial decision clarifying the law. Respondent locates (Br. 11) the source of that ambiguity in another subsection of the same statute, 18 U.S.C. 3624(a), which states, in pertinent part, that "[a] prisoner shall be released by the Bureau of Prisons on the date of the expiration of the prisoner's term of imprisonment," less any time credited toward his sentence for satisfactory behavior.

Contrary to respondent's assertions, no such ambiguity exists. Section 3624(a) says not a word about supervised release. And nothing in Section 3624(a) implies that an individual who is not released by the Bureau of Prisons on "the date of the expiration of [his] term of imprisonment" is entitled as a remedy to a reduction in his term of supervised release on a conviction that remains valid. Presumably, respondent would not contend that a defendant may avoid other terms of his

remaining sentence, such as the payment of a fine, as a remedy for a violation of Section 3624(a). There is no more support in Section 3624(a) for the remedy that respondent does suggest.

Indeed, Section 3624(a) does not appear to have been intended to address the situation of persons, such as respondent, who were released from prison on the very date prescribed under a revised sentence imposed by the district court.[1] Under the natural reading of Section 3624(a), such prisoners *are* released "on the date of the expiration of [their] term of imprisonment," notwithstanding that the date could have come earlier if the new judicial decision had been announced or applied to their case earlier.[2] Neither the text nor the legislative history of Section 3624(a) suggests that Congress

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[1] After the hearing on respondent's unopposed motion to vacate his Section 924(c) convictions under *Bailey* v. *United States*, 516 U.S. 137 (1995), the district court imposed a revised sentence directing that respondent be released from prison immediately. Judgment 2 (May 2, 1996). The Bureau of Prisons complied with that directive.

[2] Such a prisoner would not automatically be entitled to release on the day that his original term of imprisonment on any surviving counts would expire. For example, many district courts, after invalidating a defendant's sentence on a Section 924(c) count under *Bailey*, resentenced the defendant to an enhanced term of imprisonment on a surviving drug count based on his possession of a firearm. See Sentencing Guidelines § 2D1.1(b)(1). The courts of appeals have uniformly upheld such resentencings. See, *e.g.*, *United States* v. *Gordils*, 117 F.3d 99 (2d Cir.) (47-month and 37-month enhancements), cert. denied, 522 U.S. 975 (1997); *United States* v. *Morris*, 116 F.3d 501 (D.C. Cir.) (37-month and 17-month enhancements), cert. denied, 522 U.S. 975 (1997); *United States* v. *Davis*, 112 F.3d 118 (3d Cir.) (32-month enhancement), cert. denied, 522 U.S. 888 (1997); *United States* v. *Smith*, 103 F.3d 531 (7th Cir. 1996) (17-month enhancement), cert. denied, 520 U.S. 1248 (1997). The government did not seek such resentencing in this case.

intended the phrase "on the date of the expiration of the prisoner's term of imprisonment" to have the more esoteric meaning assumed by respondent and the court of appeals, *i.e.*, as either the date that the prisoner's term actually expired under the sentence imposed by the district court or on the earlier date on which the prisoner's term could have expired under a retroactively applied change in the law. To the contrary, as noted in our opening brief (at 13 n.7), the provision of Section 3624(a) on which respondent and the court of appeals rely was designed simply to provide a single straightforward rule governing the date of a prisoner's release, "replac[ing] a confusing array of statutes and administrative procedures concerning the determination of the date of release of a prisoner." S. Rep. No. 225, 98th Cong., 1st Sess. 144 (1983).[3]

[3] Amici National Association of Criminal Defense Lawyers, *et al.*, while not joining in respondent's statutory ambiguity argument, urge an extension of the common law doctrine of constructive parole, which permits a defendant to receive credit against his term of imprisonment for time erroneously spent at liberty through no fault of his own. See, *e.g.*, *White* v. *Pearlman*, 42 F.2d 788, 789 (10th Cir. 1930). Amici's argument is foreclosed by the plain language of Section 3624(e), which provides, *inter alia*, that "[a] term of supervised release does not run during any period [of 30 days or more] in which the person is imprisoned." Amici cite only one case that applied the constructive parole doctrine to credit time erroneously spent in prison against time to be spent on parole. *United States ex rel. Shuster* v. *Vincent*, 524 F.2d 153 (2d Cir. 1975). *Shuster* is distinguishable from this case not only because the state law in that case contained no provision similar to Section 3624(e), which would have barred a person's term of parole from running during his term of incarceration, but also because of its "appalling" facts "reminiscent of Solzhenitsyn's treatise" *The Gulag Archipelago* that persuaded the court of appeals to create an equitable remedy. 524 F.2d at 154 (noting that the petitioner was wrongfully confined in a mental institution and a prison for "44 years after conviction of a crime for which the average time of imprisonment before parole is 15 years").

B. Terms Of Supervised Release Should Not Be Shortened In Order To Preserve Appeals That Would Otherwise Be Moot

Respondent also contends (Br. 14) that, if the Court concludes that Section 3624 unambiguously provides that a defendant's term of supervised release commences only upon his release from prison, the Court should reject that "literal interpretation" of Section 3624 as contrary to "Congress's clear intent to allow appeals from [Sentencing] Guidelines determinations" under 18 U.S.C. 3742. Respondent notes that a defendant's appeal challenging the length of his term of imprisonment might become moot if the defendant has completed his term of imprisonment before the appeal is decided. But because the appeal would not be moot if the sentence still could have "collateral legal consequences" for the defendant after his release, *Sibron* v. *New York*, 392 U.S. 40, 57 (1968), respondent argues (Br. 15-19) that Section 3624 should be construed as creating such collateral legal consequences, *i.e.*, as providing that a reduction in a defendant's completed term of imprisonment reduces his remaining term of supervised release.[4]

Respondent's argument is without support in the text or legislative history of Section 3624, Section 3742, or any other provision of the Comprehensive Crime

[4] Respondent similarly contends (Br. 19-20) that a literal construction of Section 3624 "would also be in contradiction to Congress's intent under 28 U.S.C. § 2255" to allow defendants to seek post-conviction review of their sentences of imprisonment. That argument fails for the same reasons as does respondent's argument based on 18 U.S.C. 3742.

Control Act of 1984. Respondent does not identify any congressional expression of intent that supervised release serve as a mechanism to prevent defendants' appeals of terms of imprisonment from becoming moot as a result of the defendants' release from prison.

Instead, Congress chose a different, and more direct, mechanism to prevent sentencing appeals from becoming moot. In another section of the Comprehensive Crime Control Act, Congress specifically provided that a defendant may, in certain circumstances, be allowed to remain free pending an appeal of his conviction or sentence. 18 U.S.C. 3143(b). The district court must find that the defendant "is not likely to flee or pose a danger to the safety of any other person or the community," that the appeal "is not for the purpose of delay," and that the appeal "raises a substantial question" that is "likely to result" in reversal, a new trial, a sentence that does not include imprisonment, or "a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process." *Ibid.* In light of Section 3143(b), which specifically addresses the concern that a defendant may have served his entire term of imprisonment before his appeal is decided, it is implausible that Congress also intended to address that concern through a per se rule requiring that time erroneously served in prison be credited against time on supervised release.

Respondent mistakenly asserts that two courts of appeals have "concluded that in order to provide meaningful relief under 18 U.S.C. § 3742, credit from a supervised release term is a valid exercise of judicial authority." Br. 17-18 (citing *United States* v. *Cottman*, 142 F.3d 160 (3d Cir. 1998), and *United States* v. *Fadayani*, 28 F.3d 1236 (D.C. Cir. 1994)). In those

cases, the courts held that the defendants' appeals of sentences of imprisonment were not moot, even though the defendants had been released from prison, because the courts could not conclude that there was "no *possibility* that any collateral legal consequences will be imposed" on the defendants as a result of the sentences. *Fadayani*, 28 F.3d at 1241 (quoting *Sibron*, 392 U.S. at 57); accord *Cottman*, 142 F.3d at 164.[5] The courts identified two such possible "collateral legal consequences": first, that a reduction in the defendant's completed term of imprisonment could, under the Sentencing Guidelines, affect the duration of any future term of imprisonment that the defendant might receive, *Cottman*, 142 F.3d at 164-165; and, second, that a reduction in the defendant's completed term of imprisonment "would likely merit a credit against [his] period of supervised release," *id.* at 165. The courts did not definitively hold in either case that a defendant is automatically entitled to credit against his time on supervised release for any time that he erroneously spent in prison. The courts simply assumed that such

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[5] An application of the *Sibron* rule in the sentencing context can be found in *Mabry* v. *Johnson*, 467 U.S. 504 (1984), which respondent erroneously claims (Br. 20) to be "[i]n [c]ontravention [t]o" the government's position in this case. In *Mabry*, a state prisoner sought by a petition for habeas corpus to enforce a proposed plea agreement that would have allowed his term of imprisonment on a new conviction to run concurrently with his terms of imprisonment on earlier convictions. In a footnote, this Court observed that the case was not mooted by the prisoner's release on parole because "whether [he] must serve the sentence now under attack consecutively to his prior sentences will affect the date at which his parole will expire under state law." 467 U.S. at 507 n.3. As respondent concedes (Br. 21), *Mabry* "was based on Arkansas parole law." *Mabry* thus has no relevance to the construction of the federal statutory provisions at issue in this case.

credit was a possible "collateral legal consequence" of a reduction in the defendant's completed sentence of imprisonment. See *Fadayani*, 28 F.3d at 1241 ("Although the government may be correct that both of these contingencies are remote, *Sibron* requires only that they be possible."). The courts' one-sentence discussion in each case of whether a reduction in a defendant's term of imprisonment might affect his term of supervised release—unaccompanied by any citation of authority, except in *Cottman* to *Fadayani*—reflects no consideration of the statutes governing supervised release or, by the time of *Cottman*, the conflicting appellate decisions on the question presented here. And nothing in either case supports respondent's assertion (Br. 27) that the courts actually concluded that credit was necessary "in order to provide meaningful relief under 18 U.S.C. § 3742."[6]

Finally, contrary to respondent's assertions, the literal meaning of Section 3624(e)—that a person's term of supervised release does not begin until he is actually released from prison—accords with Congress's intent in enacting the supervised release provisions of the

[6] In any event, *Cottman* and *Fadayani* appear to involve defendants who were seeking to have their sentences of imprisonment reduced to one year or less. See *Cottman*, 142 F.3d at 165; *Fadayani*, 28 F.3d at 1241. Such a reduction could potentially affect a defendant's sentence of supervised release because the Sentencing Guidelines prescribe supervised release only when a defendant is sentenced to imprisonment for more than one year (or when required by statute). See Sentencing Guidelines § 5D1.1(a) and (b). A reduction in the defendants' sentences in *Cottman* and *Fadayani* could thus have enabled the district courts to reconsider whether to impose any term of supervised release. See *United States* v. *Eske*, 925 F.2d 205, 206 n.2 (7th Cir. 1991) (holding that an appeal of a completed term of imprisonment was not moot in such circumstances).

Comprehensive Crime Control Act. As explained in our opening brief (at 14-18), Congress intended that supervised release would serve purposes distinct from incarceration. Supervised release was designed "to ease the defendant's transition into the community," "to provide rehabilitation" through "supervision and training programs after release," and thereby to protect the community into which the defendant is released. S. Rep. No. 225, *supra*, at 124; see also 18 U.S.C. 3553(a)(2)(B)-(D), 3583(c) (identifying the sentencing considerations applicable to supervised release as including "to afford adequate deterrence to criminal conduct," "to protect the public from further crimes of the defendant," and "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment").[7] Supervised release, unlike incarceration, was not intended to serve "the sentencing purposes of incapacitation and punishment." S. Rep. No. 225, *supra*, at 124; see also 18 U.S.C. 3553(a)(2)(A), 3583(c) (excluding from the sentencing considerations applicable to supervised release "provid[ing] just punishment for the offense"). The distinct purposes of supervised release that Congress identified can be adequately served only when a person has been discharged from prison into the community. See *United States* v. *Joseph*, 109 F.3d 34, 38-39 (1st Cir. 1997) ("Incarceration * * * does nothing to assist a defendant's transition back into society and is not a

[7] As noted in our opening brief (at 16), although the Comprehensive Crime Control Act did not identify "protect[ing] the public from further crimes of the defendant" as a sentencing consideration relevant to supervised release, Congress subsequently amended Section 3583(c) to include a reference to that sentencing consideration.

reasonable substitute for a portion of the supervised release term.").[8]

C. Congress Has Provided An Avenue Of Meaningful Relief For Defendants Who Have Been Incarcerated On A Conviction That Is Subsequently Vacated

Respondent finally contends (Br. 24) that 18 U.S.C. 3583(e)(1) "does not provide meaningful relief" for persons in his circumstances for two reasons: first, Section 3583(e)(1) allows a district court to terminate a term of supervised release only after the defendant has served at least one year of that term, and, second, a district court has discretion under Section 3583(e)(1) whether to terminate a term of supervised release. Because Congress believed that supervised release serves important purposes that are overcome only where there are specific and sufficient countervailing interests, Section 3583(e)(1) does not afford an individual the identical relief—an automatic credit—that would be available under the court of appeals' decision. Section 3583(e)(1) nonetheless provides an avenue of "meaningful relief" that, in contrast to the court of appeals' approach, accords with the congressional purposes underlying supervised release.

[8] It makes no difference whether, as respondent observes (Br. 22), supervised release may, for some purposes, be viewed as punishment. See, *e.g.*, *United States* v. *Dozier*, 119 F.3d 239, 242 (3d Cir. 1997) (concluding that "[s]upervised release is punishment" for ex post facto purposes). Our point is that Congress intended imprisonment and supervised release to serve different purposes. That intent supports construing Section 3624, in accordance with its plain language, as providing that a person's term of supervised release begins only upon his actual release from prison.

Contrary to respondent's assertions (Br. 24-25), there is a significant benefit for an individual who, after serving a one-year term of supervised release, obtains early termination of supervised release under Section 3583(e)(1) based in part on the "interest of justice" reflected in his service of time in prison on a conviction later set aside.[9] And, even before a defendant has served one year of supervised release, Section 3583(e)(2) permits the district court to modify the conditions of his supervised release.

Nor does the district courts' discretion over Section 3583(e)(1) motions for early termination of supervised release render that avenue of relief meaningless. District courts exercise that discretion frequently in favor of defendants. During the year ending September 30, 1998, for example, 1462 former federal prisoners were granted early termination of supervised release. Administrative Office of the United States Courts, *Judicial Business of the United States Courts* 275 (1998).

Moreover, Section 3583(e)(1) requires the district courts to consider whether early termination of supervised release is "warranted by the conduct of the defendant released and the interest of justice," and thus is no longer necessary to achieve the congressionally identified purposes of easing the defendant's transition

[9] Congress recognized the significance of the difference between one-year and three-year terms of supervised release in Section 3583(b), which authorizes a term of supervised release of "not more than three years" for a Class C or Class D felony, but a term of supervised release of "not more than one year" for a Class E felony or a misdemeanor (other than a petty offense). 18 U.S.C. 3583(b)(2) and (3); see also, *e.g.*, 21 U.S.C. 841(b)(1)(D) (requiring a term of supervised release for a particular category of drug offense of "at least 4 years" if the defendant has a criminal record and of "at least 2 years" if the defendant has no criminal record).

into society and protecting the community from a recurrence of his criminal behavior. See S. Rep. No. 225, *supra*, at 124. The court of appeals' remedy—automatic early termination of supervised release for defendants in respondent's position—gives no consideration to those purposes. It would instead reinstate for such defendants the sort of regime that Congress sought to eliminate with supervised release, in which a defendant's period of supervision turned "on the almost sheer accident of the amount of time that happens to remain of the term of imprisonment when the defendant is released," rather than on the needs of the defendant and the community. *Ibid.*[10]

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
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DECEMBER 1999

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[10] Respondent also contends (Br. 23) that requiring him to serve the remaining nine months of his term of supervised release "would not serve any purpose" because he "has been fully and successfully re-integrated into society." The legal issue in this case, however, does not turn on respondent's individual response to release. Respondent's arguments concerning his allegedly "full[] and successful[]" rehabilitation may be presented to the district court on remand in a motion for early termination of supervised release under Section 3583(e)(1).